

DECOLONISING EXPROPRIATION, SYSTEMS THEORY & RADICAL POLITICAL THEORY THROUGH THE LENS OF *BUSINESS VENTURE INVESTMENTS 900 (PTY) LTD V CITY OF EKURHULENI METROPOLITAN MUNICIPALITY*

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Abstract

The objectives of land reform, as per section 25 of the Constitution of the Republic of South Africa, 1996, are limited by conservative property conditions that maintain the status quo. As such, subjecting land expropriation to compensation is unjust and fortifies the brutality of apartheid and colonialism instead of addressing these historical injustices. This article argues that just and equitable nil compensation challenges the status quo. It will analyse Business Venture Investments 900 (Pty) Ltd v City of Ekurhuleni Metropolitan Municipality, to illustrate that just and equitable redress can be brought forth through a decolonial approach to nil compensation. It will then problematise Niklas Luhmann's framework, contending that it perpetuates the status quo by undermining the role that positive law can play in correcting the injustices of the past. The article further asserts that the status quo is bolstered by positive law, such as South Africa's Constitution, which helps keep marginalised groups landless.

Keywords: *expropriation; nil compensation; just and equitable; decolonisation, dispossession, status quo.*

1 Introduction

Those on the margins of society experience the law differently from those who hold privileged property positions and [...] their marginal perspective could be instructive in thinking about the tension between stability and change in the transformational contexts and the need for and the possibilities of meaningful change.¹

During the apartheid and colonial eras, land in South Africa was pilfered from black people² then sold, donated, and illicitly given to white people.³ This process of dispossession - wherein no payment was provided to those deprived of their land - casts doubt on the justiciability of the requirement that current landowners receive compensation for expropriation.⁴

Over the past 30 years, viewpoints suggesting that people of colour are unfit to make productive use of land⁵ and should be relegated to townships and informal settlements have been used to circumvent land reform initiative⁶s. This, coupled with the country's history of dispossession and the legislature's failure to enact the Expropriation Bill or amend section 25 of the Constitution of the Republic of South Africa, 1996 ('the Constitution') to facilitate land expropriation without compensation with greater ease,⁷ has led

- 1 ZT Boggendoel 'Property and Access: Inequality of Land Relations and the Continued Vulnerability of Women' (2023) *South African Law Journal* at 387.
- 2 D McKenzie & B Swails 'Land was stolen under apartheid. It still hasn't been given back' 20 November 2018 <https://edition.cnn.com/2018/11/20/africa/south-africa-land-reform-intl/index.html> (accessed 6 June 2024).
- 3 M Mohwaduba 'Towards Land Restitution through an African Perspective on Justice: A critical Analysis of Land Reform and the Role of Re-Imagination' (2018) *Pretoria Student Law Review* at 79.
- 4 AD Smith 'Apartheid land reforms in chaos as Blacks sell farms back to whites' 03 September 2011 <https://www.independent.co.uk/news/world/africa/apartheid-land-reforms-in-chaos-as-blacks-sell-farms-back-to-whites-2348437.html> (accessed 24 January 2014); T Madlingozi 'Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution' (2017) *Stellenbosch Law Review* at 141-142; WR Hinson & E Robinson E "'We Didn't Get Nothing": The Plight of Black Farmers' (2008) *Journal of African American Studies* at 294; V Stull et al 'Environmental apartheid: Eco-health and rural marginalization in South Africa' (2016) *Journal of Rural Studies* at 372.
- 5 J Pienaar et al 'Land matters and rural development: 2011' (2011) *Southern African Public Law* at 523, 535; A England 'South Africa's black farmers struggle with land reform' 5 December 2013 <https://www.ft.com/content/efb94b78-5bf2-11e3-931e-00144feabdc0> (accessed 12 June 2024); M Ngubane 'Obstacles facing a young black farmer in South Africa: A personal story' 12 April 2018 <https://theconversation.com/obstacles-facing-a-young-black-farmer-in-south-africa-a-personal-story-94037> (accessed 12 June 2024).
- 6 A Desai *We are the poor: Community struggles in post-apartheid South Africa* (2002) at 20.
- 7 The Citizen 'Malema ignites debate in parliament on expropriation of land without compensation' 27 February 2018 <https://www.citizen.co.za/news/south-africa/watch-malema-ignites-debate-in-parliament-on-land-expropriation-without-compensation/> (accessed 6 June 2024).

many to argue that political parties are controlled by the private sector, which limits the extent to which land expropriation without compensation can gain traction.⁸

This article crafts a decolonised perspective on land expropriation without compensation. It will reflect on the *Business Venture Investments 900 (Pty) Ltd v City of Ekurhuleni Municipality*⁹ ('*Business Venture*') case through the systems theory and promote utilitarianism against capitalis¹⁰m.

The article diverges from interpretations that demonise land expropriation without compensation.¹¹ Some view nil compensation as a threat to liberal principles embedded in the current constitutional property values.¹² For instance, property owners often claim that South Africa was their 'promised land'.¹³ On the other hand, the poor and the proletariat justify the reclamation of all land as 'thousands were evicted, and many died' from their land.¹⁴

Business Venture proves that nil compensation does not have to be demonised. Nil compensation tests constitutional land reform against a jurisprudential discourse between the status quo,¹⁵ 'capital influence and liberal thoughts surrounding property ownership' and redistribution of land as a tool to address landlessness. Nil

8 FS McChesney *Money for nothing: Politicians, rent extraction, and political extortion* (1997) at 71; B Cousins 'Land reform in South Africa: The politics of expropriation without compensation' in H Chitonge & R Harvey *Land tenure challenges in Africa: Confronting the Land Governance Deficit* (2022) at 100; A Mthembu 'Reflections on expropriation-based land reform in Southern Africa' (2019) 75 *Town and Regional Planning* at 58; JW Van Rensburg 'Land Reform Without Compensation in South Africa: A Critical Analysis of the Taxation Policy' (LLM dissertation, North-West University, 2019) at 18.

9 (20/28475) [2021] ZAGPJHC 544 (13 October 2021).

10 H Lubbe & E du Plessis 'Compensation for expropriation in South Africa, and International law: The leeway and the limits' (2021) *Constitutional Court Review* at 80 fn 2; ZT Boggenpoel 'Politics or Principle?: Making Sense of the Expropriation Without Compensation Debate' in O Zenker et al (eds) *Beyond Expropriation Without Compensation: Law, Land Reform and Redistributive Justice in South Africa* (2024) at 35.

11 J Gerber 'National Assembly adopts Expropriation Bill, but opposition parties object for different reasons' 29 September 2022 <https://www.news24.com/news24/politics/parliament/national-assembly-adopts-expropriation-bill-but-opposition-parties-object-for-different-reasons-20220929> (accessed 6 June 2024).

12 MA Christians 'Elite consensus: The case of land reform in South Africa' (Unpublished PhD thesis, Stellenbosch University, 2021) at 2.

13 D James "'After years in the wilderness": The discourse of land claims in the New South Africa' (2000) *The Journal of Peasant Studies* at 158; C Boisen 'From land dispossession to land restitution: European land rights in South Africa' (2017) *Settler Colonial Studies* at 327.

14 W Beinart & P Delius 'The historical context and legacy of the Natives Land Act of 1913' (2014) *Journal of Southern African Studies* at 667.

15 The word 'status quo' refers to capitalism, existing property ownership, the private sector's role in hindering the government's land reform programmes, and property ownership based on race and apartheid-colonial land dispossession.

compensation must be ‘just and equitable’ and encompass the factors listed in section 25(3) of the Constitution.¹⁶

2 Discussing the facts in *Business Venture*

Expropriation can be defined as a process through which the state acquires property without the owner’s consent and transfers it to another entity for a justifiable public purpose¹⁷. Expropriation without compensation was the central issue in *Business Venture*. The applicant, Business Venture Investment 900 (Pty) Ltd, argued that section 10(3) of the Expropriation Act required the respondent, Ekurhuleni Metropolitan City (‘the Municipality’), to give it reasonable particulars in terms of section 10(7) of the Expropriation Act, as its farm was seized and expropriated by the Municipality¹⁸y.

However, the Municipality’s Notice of Expropriation did not expressly state that it would monetarily reimburse the applicant through section 9 of the Expropriation Act, which states that ‘an affected property owner whose property has been subjected to expropriation, is entitled, within sixty days of the Notice, to be informed about the amount demanded as compensation’.¹⁹

The Court had to determine the degree to which land can be expropriated without compensation for the benefit of people in need of housing as per section 9(3) of the Housing Act.²⁰

3 Autopoietic systems theory and the theorisation of radical political theory

Autopoietic systems theory is a doctrine that views social systems as self-replicating systems of communication²¹. Every institution finds its roots in the fundamental elements of social systems that self-replicate through communication²²n. Specific forms of communication

16 Lubbe & Du Plessis (n 10) at 80 fn 2; M Van Staden ‘*Fraus Legis* in Constitutional law: The case of expropriation “without” or for “nil” compensation’ (2021) 24 *Potchefstroom Electronic Law Journal* at 1. Although nil compensation and expropriation of land without compensation are different legal concepts, the author will provocatively use them as interchangeable terms.

17 B Hoops ‘Expropriation without compensation: A yawning gap in the justification of expropriation?’ (2019) *South African Law Journal* at 265.

18 *Business Venture* (n 9) paras 1 & 2.

19 *Business Venture* (n 9) para 4.

20 Act 107 of 1997; *Business Venture* (n 9) para 3.

21 D Michailakis ‘Law as an Autopoietic System’ (1995) 38 *Acta Sociologica* at 329; E Keyes ‘Two Conceptions of Judicial Integrity: Traditional and Perfectionist Approaches to Issues of Morality and Social Justice’ (2008) 22 *Notre Dame Journal of Law, Ethics & Public Policy* at 235.

22 Michailakis (n 21) 333.

thrive within these social systems, thus leading to the formation of autonomous subsystems.²³ Autopoietic law, owing to its self-referential nature, implies that law sets up internal models of social reality meant to reflect reality and other subsystems in its own terms.²⁴ Within these legal systems, there are assumed models about what social reality or other systems (should) look like.²⁵

Buitendag and Van Marle were among the first legal scholars in South Africa to spark a jurisprudential discussion about the systems theory. Niklas Luhmann is credited with creating this philosophy, particularly the idea that the law is an autopoietic system.²⁶ A self-referential legal system based on autopoietic theory, coupled with judges' commitment to the separation of powers doctrine,²⁷ allows the law to protect itself against the moral aspects of the justice system and maintain the status quo.²⁸

The systems theory in the sociology of law is perceived as negative dialectics of law.²⁹ It exceeds the constitutionalist warfare of law by protecting the status quo and favouring 'stability, consistency and justice' for the privileged in lieu of transformation.³⁰ Luhmann submits that the political system arranges itself under the false notion that coordinated political action can solve all the world's problems.³¹

Luhmann's assertion ignores the fact that the political theorisation of establishing an orderly society may be legitimised by the people who support it and have democratically elected it to power to address long-standing social inequalities. When issues of national interest - such as addressing historical injustices perpetuated by government - arise, the radical political theorisation of transformation is undermined by capital. Transformation is seen as a threat and theft by those who have financial capital.³²

As such, capital spends ample resources to monitor those in power who have the potential to threaten the interests of the status quo. This is seen in the hostility surrounding property valuation and the monopolistic acquisition of property, from which white people benefit.³³

23 Michailakis (n 21) 328.

24 As above.

25 As above.

26 N Buitendag & K van Marle 'Afriforum v Malema: The limits of law and complexity' (2014) *Potchefstroom Electronic Law Journal* at 2893.

27 B Jessop *State Power* (2007) at 27 & 33.

28 N Buitendag & K van Marle (n 26) 2893.

29 R Cordero 'The negative dialectics of law: Luhmann and the sociology of juridical concepts' (2020) *Social & Legal Studies* at 4.

30 As above.

31 M King & C Thornhill (eds) *Luhmann on Law and Politics: Critical appraisals and applications* (2006) at 4.

32 MM Shirley 'Institutions and development' in *Handbook of New Institutional Economics* (2005) 612.

To challenge the state lawfully, submits Luhmann, it is essential to withdraw ethics and equalitarianism of political values³⁴. Withdrawing ethics and egalitarianism facilitates a compromise in the autopoietic legal system, which allows illegitimate power to create a constitutional order more proficiently than an elected government³⁵. For example, section 25 of the Constitution requires the state to provide compensation when expropriating property and safeguards private property rights against arbitrary deprivation and expropriation, thus impeding the effect on land reform³⁶.

The African National Congress ('ANC') prioritised acquiring political power in 1994. Anticipating the National Party's ('NP') democratic overthrow, the United States of America weaponised the World Bank's 'willing buyer, willing seller' model against the ANC³⁷ to coerce it into guaranteeing property and economic power for the white populace.³⁸

The political theorisation of law does not serve the interests of the majority since compromised constitutionalism subverts democracy.³⁹ It instead protects the interests of the minority.⁴⁰ For instance, section 25 protects minority property by allowing the minority to hold vast tracts of land while governing the property conditions of a dispossessed majority.⁴¹

According to Luhmann's autopoietic authority, silence is a form of communication that projects itself into society.⁴² Silence is not factual, even though it is accurate, when a systematic pattern of power is transferred.⁴³ The silence of power in South Africa is seen through the Constitution.

The Constitution is regarded as the 'best in the world' by the rich and resourced in the country.⁴⁴ Yet, the majority lack property ownership, inequality remains rampant, and the state is struggling to

33 N Luhmann 'Globalization or world society: How to conceive of modern society?' (1997) *International Review of Sociology* at 67.

34 J Příbáň 'Law as a Social System' (2005) *Journal of Law and Society* at 331.

35 As above.

36 BV Slade 'Towards a clearer understanding of the difference between the obligation to pay compensation and the validity requirements for an expropriation' (2019) *Speculum Juris* at 3.

37 D James 'The return of the broker: Consensus, hierarchy, and choice in South African land reform' (2011) *Journal of the Royal Anthropological Institute* at 325.

38 J Herbst 'Creating a New South Africa' (1994) *Foreign Policy* at 135.

39 R Dworkin 'Constitutionalism and Democracy' In *Constitutionalism and Democracy* (2017) at 3-12; H Klug *Constituting democracy: Law, globalism and South Africa's political reconstruction* (2000) at 133; H Klug 'Decolonisation, compensation and constitutionalism: Land, wealth and the sustainability of constitutionalism in post-apartheid South Africa' (2018) *South African Journal of Human Rights* at 16.

40 J Seekings & N Nattrass *Class, race, and inequality in South Africa* (2008) at 398.

41 J Dugard 'Unpacking Section 25: What, if any, are the legal barriers to transformative land reform?' (2019) 9 *Constitutional Court Review* at 138.

42 R Anchor 'Whose Autopoiesis?' (2000) *History and Theory* at 113.

43 As above.

combat unemployment.⁴⁵ For example, white people own 72% of all farms and agricultural land owned by individuals, while Coloureds own 15%, Indians own 5%, and Africans own a meagre 4%.⁴⁶ Hence, Philippopoulos-Mihalopoulos submits that:

[...] silence remains communication. Society does not recognise what cannot be verbalised because it does not deal with it. In silence, society only sees the threat, the ignorance of what cannot be communicated. Silence, according to Luhmann, "is the mirror which society comes to see that what is said is not said."⁴⁷

Constitutionalism, when it does not serve people equally, becomes a remnant of political detachment from reality.⁴⁸ Therefore, when constitutionalism is 'non-pro-nationalist' as a socialist pact, its theorisation 'of law' remains disconnected from the constituency to which it is supposed to be answerable.⁴⁹

Restorative justice and the 'functional differentiation' in property - that is, the commercial value of the property - should restore dignity to those who were wrongfully deprived of it⁵⁰. Functional differentiation is a system⁵¹ that is seen through white socio-economic prowess and classicism.⁵² As such, restorative justice remains intangible because the system is designed to protect minority property interests rather than address the colonial roots of dispossession and property owners' ship.⁵³ This approach leads to power materialising as wealth and creates spatial injustices, making substantive equality difficult to achieve.⁵⁴

'There is no law outside the law', argues Luhmann, and law, which is self-referential, is unpredictable⁵⁵. However, to extinguish its unpredictability, positive law is used by parliamentarians to ensure the self-referentiality of the law.⁵⁶ When defining constraints and

44 T Madlingozi 'Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution' (2017) *Stellenbosch Law Review* at 139.

45 R Calland 'Why South Africa's Constitution is under attack' 17 March 2017 <https://theconversation.com/why-south-africas-constitution-is-under-attack-74763> (accessed 21 June 2024).

46 Department of Rural Development and Land Reform 'Land Audit Report' https://www.gov.za/sites/default/files/gcis_document/201802/landauditreport13feb2018.pdf at 2 (accessed 21 June 2024).

47 A Philippopoulos-Mihalopoulos 'The vociferous rupture: Silence, law and ignorance' (2005) *Organdi Revue* at 7.

48 C Schmitt *Constitutional theory* (2008) at 10.

49 MA Wilkinson 'Political Constitutionalism and the European Union' (2013) *The Modern Law Review* at 210.

50 R Koen 'All Roads Lead to Property: Pashukanis, Christie and the Theory of Restorative Justice' (2017) *Potchefstroom Electronic Law Journal* at 196-197.

51 N Luhmann *The differentiation of society* (1982) at xiv.

52 CI Harris 'Whiteness as property' (1993) *Harvard Law Review* at 1781.

53 J Modiri 'Law's Poverty' (2015) 18(2) *Potchefstroom Electronic Law Journal* at 249.

54 Modiri (n 53) 251.

55 G Teubner *Law as an Autopoietic System* (1993) at 2.

56 As above.

rights at stake, the law establishes the conditions that must be met before one may refer to a legally significant incident or legitimate stand⁵⁷rd. As Teubner submits:

[...] law is self-constituting in that legal rules begin to take on a 'life of their own'. They no longer appear as 'legal' means to a 'social' end, but as an end in themselves [...] it seems as if the law begins to lead a life of its own and stops merely a reflex of other aspects of society.⁵⁸

Luhmann believes that illegitimate power can create a constitutional order.⁵⁹ Yet, questionably created law should be separated from politics and economics.⁶⁰ South Africa must undertake tremendous rebuilding work,⁶¹ as state resources are limited and wealth is concentrated in the private sector, which is detrimental to black people.⁶²

According to the systems theory, property is part of economics and the banking financialization thereof is based on the value and dignity that lies therein for the property owner⁶³. To create wealth and distribute it fairly among citizens, the government, not the private sector, must be in contro⁶⁴l. However, the ANC was captured by the private sector, which led to the creation of the current section 25 constitutional clau⁶⁵se, whose limits economically marginalise the p⁶⁶oor.

4 Section 25 of the Constitution, property ownership and the systems theory

In the midst of debates regarding land expropriation without compensation⁶⁷, some argue that it is not necessary to amend section 25 of the Constitutio⁶⁸n. In *Arun Property Development (Pty) Ltd v*

57 Teubner (n 55) 33.

58 Teubner (n 55) at 40.

59 K Sideri 'Questioning the neutrality of procedural law: internet regulation in Europe through the lenses of Bourdieu's notion of symbolic capital' (2004) *European Law Journal* at 63.

60 M Deflem 'The boundaries of abortion law: systems theory from Parsons to Luhmann and Habermas' (1998) *Social Forces* at 780.

61 N Friedman 'The South African common law and the Constitution: Revisiting horizontality' (2014) *South African Journal on Human Rights* at 67.

62 As above.

63 A Bell & G Parchomovsky 'Theory of property' (2005) *Cornell Law Review* at 537.

64 Bell & Parchomovsky (n 63) 582.

65 S Booysen 'The ANC and the regeneration of political power, 1994-2011' (2011) *1 One Hundred Years of the ANC: Debating liberation histories and democracy today* at 20-24.

66 J Dugard et al 'Rights-compromised or rights-savvy? The use of rights-based strategies to advance socio-economic struggles by Abahlali baseMjondolo, the South African shack-dwellers' movement' (2015) *Social and Economic Rights in Theory and Practice: Critical Inquiries* at 23-34; L Mhlana 'To remain' unpublished PhD thesis, University of the Free State, 2022 at 3, 138, 140.

City of Cape Town,⁶⁹ Moseneke DCJ held that state coercion through expropriation becomes effective when the state does not request the consent of an owner.⁷⁰ *City of Cape Town v Helderberg Park Development*⁷¹ found that expropriation is acceptable if the owner is deprived of ownership by a regulatory authority that seeks to advance the welfare of the public.⁷²

The state must advance the acquisition of expropriated land without compensation. To this end, the Expropriation Bill was slated to substitute the 1975 Expropriation Act.⁷³ Its expropriation provisions mirror those found in the Constitution.⁷⁴

In 2018, Parliament issued a draft Bill introducing clause 12(3) that enumerates the conditions under which it 'may be just and equitable for nil compensation to be paid when land is expropriated in the public interest'.⁷⁵ This showed Parliament's intention to explore the constitutional legitimacy of 'nil compensation' even though it did not intend to expropriate vast tracts of productive agricultural land.⁷⁶

Utilitarianism is based on the welfare of the majority.⁷⁷ It fulfils worth and dignity.⁷⁸ When law and property traverse, irrespective of the liberal stance on the fulfilment of compensation, expropriation must be for the welfare of the people who need land.⁷⁹ Through utilitarianism, the state can provide housing at an opportune time of need.⁸⁰

However, in South Africa, centralised power that is focused on defending individual rights against untrammelled power has brought forth statist individualism.⁸¹ This approach is accepted in South Africa

67 MA Mubecua & MW Mbatha 'Expropriation of Land in the Pre and During Democratic South Africa: Compensation or Nil Compensation?' (2021) 18 *African Renaissance* at 172-173.

68 Mubecua & Mbatha (n 67) at 172.

69 2015 (2) SA 584 (CC) ('Arun').

70 Arun (n 69) para 58.

71 2008 (6) SA 12 (SCA) para 58.

72 *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC); B Hoops 'The Legitimate Justification of Expropriation: A Comparative Law and Governance Analysis by the Example of Third-Party Transfers for Economic Development' (2017) at 375-376, 399-511.

73 J Coetzee & J Marais 'Expropriation without compensation - it is not the end of the road and is still on the table' 15 December 2021 <https://www.fasken.com/en/knowledge/2021/12/15-expropriation-without-compensation> (accessed 14 June 2024).

74 As above.

75 As above.

76 As above.

77 ST Leal 'Constitutional Scapegoat: The Dialectic between Happiness and Apartheid in South Africa' (2016) *Fundamina* at 303.

78 WJ Du Plessis 'The usefulness of Michelman's utilitarian approach to compensation for expropriation in South Africa' (2013) *Stellenbosch Law Review* at 360-362.

79 Du Plessis (n 78) 363-364.

80 Du Plessis (n 78) 366.

because expropriation, even for a public purpose, must be informed by sound practices that endorse compensation.

Luhmann submits that ‘functional differentiation’ is seen through capitalism and classicism⁸². Property is intrinsically linked to intergenerational class hierarchies and advantages in a capitalist framework, which are deeply racialised in South Africa^{83a}. Hence, property ownership remains stratified by class and race, with white people owning a lion’s share of the land⁸⁴. As a result, capital further subverts the ideals of utilitarianism to the detriment of the majority⁸⁵.

According to Luhmann, in a legalistic normative theory, an autopoietic self-referential system indicates a degree of sovereignty that will respect a constitution that upholds identities and distinctions⁸⁶. In terms of the legal interpretation of the law, this sovereignty implies that attorneys and judges accept the reality of how Parliament established the Constitution rather than creating a hypothetical environment in which they believe it should be construed⁸⁷.

Luhmann’s interpretation of Buitendag and van Marle’s autopoietic systems theory states that the law becomes self-referential by separating itself from the present and impacting people.⁸⁸ This is done through selective reasoning and instrumentalisation, which makes it unclear whether the law should be used as a weapon.⁸⁹

Amid the uncertainty inherent in autopoietic systems, the law can become a source of oppression.⁹⁰ This is particularly true as those with financial resources can defend their interests using laws that favour consistency through conservative constitutional and property conditions.⁹¹ Such interests are defended at the expense of the

81 KJ Malan ‘The Foundational Tenets of Johannes Althusius’ Constitutionalism’ (2017) *Potchefstroom Electronic Law Journal* at 4.

82 C Wolfe ‘Making contingency safe for liberalism: the pragmatics of epistemology in Rorty and Luhmann’ (1994) *New German Critique* 107.

83 JM Modiri ‘Race as/and the trace of the ghost: jurisprudential escapism, horizontal anxiety and the right to be racist in *BoE Trust Limited*’ (2013) 16 *Potchefstroom Electronic Law Journal* at 597.

84 T Weinberg ‘Property of the People? Black Land Buyers’ Imaginings of Property Ownership, 1900-1994’ unpublished PhD thesis, University of Michigan, 2023 at 58.

85 CJ Webster & LWC Lai ‘Property rights, planning and markets: Managing spontaneous cities’ (2003) at 13, 22.

86 N Luhmann ‘The autopoiesis of social systems’ (2008) 6 *Journal of Sociocybernetics* at 85.

87 Luhmann (n 86) 85.

88 Buitendag & van Marle (n 26) 2893.

89 Buitendag & van Marle (n 26) 2898.

90 A Philippopoulos-Mihalopoulos ‘Critical autopoiesis and the materiality of law’ (2014) *International Journal for the Semiotics of Law* at 410.

91 Modiri (n 53) 228.

utilitarian aspirations of the majority, as the self-referentiality of the law divorces the law from ethics by emphasising positive law.⁹²

Despite the role of the Natives Trust and Land Act⁹³ played in the dispossession of black people⁹⁴, the current government has no radical plan to significantly empower them to achieve a balanced and economically clear racial parity of land allocation.⁹⁵

To address historical injustice caused by land dispossession, it is necessary to balance restitution with redistribution to empower those who were forcefully removed.⁹⁶ Those who claim restitution tend to be awarded compensation, while those who claim for redistribution may be given their land.⁹⁷ Mostert submits that restitution is a form of reparation.⁹⁸ In autopoietic systems theory, capital has a greater bargaining position because it knows that dispossessed people do not have the bargaining power to maintain the land and, as such, it portrays restitution as a worthy cause as compared to redistribution.⁹⁹

The 'economically clear' standard requires the use of the Land Bank to empower and dignify previously disadvantaged persons,¹⁰⁰ especially those who have been denied access to land by giving them housing at an opportune time of need. Even with such systems in place, the past thirty years have seen a regression in respect of claims that are not expeditiously dealt with at the Land Claims Commission ('LCC').¹⁰¹

This situation has been exacerbated by high poverty levels and resource scarcity¹⁰², making black people subjects of the status quo, as they do not own the means of production - that is, land.¹⁰³ To overcome such barriers, the law must address the socio-political reality.¹⁰⁴ Constitutionalism and the theorisation of the law must

92 G Teubner "“And God Laughed...” Indeterminacy, Self-Reference and Paradox In Law' (2011) *German Law Journal* at 377.

93 Act 18 of 1936.

94 H Kloppers and GJ Pienaar 'The historical context of land reform in South Africa and early policies' (2014) 17 *Potchefstroom Electronic Law Journal* at 684-685.

95 Kloppers & Pienaar (n 94) 690.

96 C Walker 'The limits to land reform: Rethinking "the land question"' (2005) 31 *Journal of Southern African Studies* at 805.

97 JL Gibson *Overcoming historical injustices: Land reconciliation in South Africa* (2009) at 107.

98 H Mostert 'Land restitution, social justice and development in South Africa' (2002) 119 *South African Law Journal* at 422.

99 K Boudreaux 'Land reform as social justice: The case of South Africa' (2010) 30 *Economic Affairs* at 18.

100 Pienaar et al (n 5) 523, 535.

101 C Walker *Landmarked: Land claims and land restitution in South Africa* (2008) at 19.

102 V Jaichand 'In transition? the struggle for socio-economic justice in South Africa' (2017) 7(1) *Notre Dame Journal of International & Comparative Law* at 16.

103 M Milazzo 'On White Ignorance, White Shame, and other Pitfalls in Critical Philosophy of Race' (2017) 34(4) *Journal of Applied Philosophy* at 561.

reflect the needs and interests of the citizenry as a unit and not as a separate entity.¹⁰⁵

The utility of constitutionalism for expropriation is a growing concern.¹⁰⁶ In places like South Africa, land reform is broadly recognised as essential, but there are sceptics with divergent views on how it should be implemented.¹⁰⁷ While the ANC's policy on land reform has been murky,¹⁰⁸ the Democratic Alliance calls for state land to be redistributed first,¹⁰⁹ while the Economic Freedom Fighters persistently call for the state to be the custodian of all land in South Africa, thus enabling the state to expropriate land without compensation.¹¹⁰

Constitutionalism preserves the status quo in society by codifying its predispositions to the detriment of marginalised groups.¹¹¹ It upholds individuality, protects property rights, takes a firm stance in favour of the Bill of Rights, and works to defame any communal structure that attempts to promote true utilitarianism.¹¹²

In his critique of the Constitution and its impact on Critical Legal Studies, Mpofo-Walsh argues that the Constitution inadequately narrates historical dispossession.¹¹³ He submits that this is a fundamental flaw in both the text and subtext of the Preamble.¹¹⁴ For him, an inadequate starting point leads to a fundamentally flawed outcome.¹¹⁵ Thus, he argues that if society cannot explicitly acknowledge the brokenness of the Constitution or recognise the crimes against humanity that were apartheid and colonialism in frank terms, the Constitution must be uprooted in its entirety.¹¹⁶

Due to the systemic power imbalances institutionalised by global superpowers interfering in the affairs of other countries, poverty and

104 K Malan 'Deliberating the Rule of Law and Constitutional Supremacy from the Perspective of the Factual Dimension of Law' (2015) 18(4) *Potchefstroom Electronic Law Journal* at 1231-1232.

105 As above.

106 GC Christie 'What Constitutes Taking of Property under International Law' (1962) 38 *British Year Book of International Law* at 312, 322 & 331.

107 R Hall 'The legacies of the Natives Land Act of 1913' (2014) *Scriptura: Journal for Contextual Hermeneutics in Southern Africa* at 10.

108 C Matseke 'Land reform in South Africa' (2021) 88(3) *The Thinker* at 41.

109 Democratic Alliance 'Our land reform plan' <https://www.da.org.za/our-land-reform-plan> (accessed 15 June 2024).

110 Lubbe & du Plessis (n 10) 97.

111 S Surajpal 'Dismantling the Status Quo: Prohibiting Unfair Discrimination on the Ground of Poverty under Capitalism' (2020) 14(2) *Pretoria Student Law Review* at 266, 267.

112 T Mfete 'Neoliberalism and inequality in post-apartheid South Africa' (2020) 14(2) *Pretoria Student Law Review* at 274-275.

113 Video: SMWX 'Dr Ntando Sindance on ANC-DA+coalition, Constitution, EFF, Jacob Zuma, MK Party, Steve Biko, racism' 16 June 2024 <https://www.youtube.com/watch?v=bTcBnZzZrU&t=2352s> (accessed 6 June 2024).

114 As above.

115 As above.

116 As above.

the law have been used to deprive states and their citizens of the ability to legitimately challenge historical land dispossessions¹¹⁷. In South Africa, this status quo is best illustrated by the ‘willing-buyer-willing-seller’ model, which is rooted in Western capitalism and was used to defend existing property owners’ property right¹¹⁸s. It is important to question how utilitarianism threatens liberal democracy in a contemporary constitutional order, in light of land dispossession and capitalism.

Instead of dispossession, non-constitutional pluralism is centred around capitalism and the establishment of utilitarianism based on equal empowerment of all citizens is treated with scepticism.¹¹⁹ This scepticism, Bader contends, threatens liberal democracy because it directly violates ‘strict separationism’ that seeks to defend the status quo.¹²⁰ *Business Venture* dealt with whether the applicant was entitled to more information in terms of section 10 of the Expropriation Act.¹²¹ Here, the Judge signified that ‘just and equitable’ compensation allows for expropriation without compensation.¹²²

In what follows, an attempt to justify the notion of a ‘just and equitable’ dilemma in nil compensation through section 25(3) of the Constitution will be explored.

5 What is ‘just and equitable’ in the context of nil compensation?

In *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd*, the Constitutional Court held that section 25(3) of the Constitution must be interpreted purposively.¹²³ The purposive interpretation in section 25, when read with *Haffeejee NO v Ethekwini Municipality*¹²⁴ and *First National Bank of SA Ltd t/a Wesbank v Minister of Finance*,¹²⁵ balances the protection of existing property owners’ interests with those of the public.¹²⁶

117 N Fraser ‘Social exclusion, global poverty, and scales of (in) justice: Rethinking law and poverty in a globalizing world’ (2011) 22(3) *Stellenbosch Law Review* at 452-453; E Lahiff ‘“Willing buyer, willing seller”: South Africa’s failed experiment in market-led agrarian reform’ in *Market-Led Agrarian Reform* (2013) at 1578.

118 E Du Plessis ‘Silence is golden: The lack of direction on compensation for expropriation in the 2011 Green Paper on Land Reform’ (2014) 17(2) *Potchefstroom Electronic Law Journal* at 803-804.

119 V Bader ‘Religions and States. A New Typology and a Plea for Non-Constitutional Pluralism’ (2003) 6 *Ethical Theory and Moral Practice* at 55-91.

120 As above.

121 *Business Venture* (n 9) paras 1, 8-9, 14, 17.

122 *Business Venture* (n 9) paras 6-7, 18.

123 2007 (6) SA 199 (CC) paras 51 fn 46 & 49.

124 2011 (6) SA 134 (CC) para 31.

125 2002 (4) SA 768 (CC) para 50.

In *Du Toit v Minister of Transport* ('*Du Toit*'), the court held that a 'just and equitable' formulation of expropriation should be accompanied by compensation and followed by a reasonable balance between the public interest and the interests of those affected¹²⁷. According to section 25(3) of the Constitution, compensation must be 'just and equitable' when considering the property's market value, usage, history (of expropriation and otherwise), and extent of state investment¹²⁸t.

In *Business Venture*, the applicant claimed that its property was subject to expropriation without compensation, which, in its opinion, was not just and equitable in terms of section 25 of the Constitution.¹²⁹ However, the court held that nil compensation was 'just and equitable'.¹³⁰

Land reform, particularly in the context of 'just and equitable' compensation, is an expensive restorative justice tool¹³¹. A clear example of the high costs connected to 'just and equitable' compensation is *Mhlanganisweni Community v Minister of Rural Development and Land and Land Reform and Others* ('*Mala-Mala*'¹³²), where the state had to settle over one R1 billion as compensation for expropriation¹³³on. Xaba and Roodt submit that *Mala-Mala* shows that 'just and equitable' compensation signifies the state's failure to advance its section 25 expropriation power¹³⁴ers. Although the *Mala-Mala* case had reached the Constitutional Court for guidance on defining 'just and equitable' compensation, then-Minister Gugile Nkwinti withdrew it, ultimately deciding to compensate a large sum to a single white family - an amount that consumed a third of the national budget¹³⁵dget. To this day, the government continues to uphold populist rhetoric that suggests that land will be expropriated without compensation¹³⁶ation.

126 *Moloto Community v Minister of Rural Development and Land Reform and Others* (LCC 204/2010) [2022] ZALCC 4 (11 February 2022) para 20.

127 2006 (1) SA 297 (CC) ('*Du Toit*') para 83.

128 D Iyer 'Is the Determination of Compensation a Pre-requisite for the Constitutional Validity of Expropriation? Haffajee NO and Others v Ethekweni Municipality and Others' (2019) 9 *Speculum Juris* at 69.

129 *Business Venture* (n 9) para 6.

130 *Business Venture* (n 9) para 7.

131 E du Plessis 'No expropriation without compensation in South-Africa's Constitution - for the time being' 9 December 2021 <https://verfassungsblog.de/no-expropriation-without-compensation-in-south-africas-constitution-for-the-time-being/> (accessed 14 January 2024).

132 (LCC 156/2009) [2012] ZALCC 7 (19 April 2012).

133 Du Plessis (n 131).

134 MB Xaba & M Roodt 'The Populist Rhetoric Around Land Acquisition in South Africa Obscures a Number of Significant Factors on Land Reform' (2018) 72 *The Thinker* 33.

135 As above.

136 As above.

Costs are more likely to be exorbitant if the expropriation is time-consuming, the property's market value is not properly calculated, or if it involves legal or political challenges.¹³⁷ As early as 2000, land expropriation with compensation contributed to the slow pace of land reform, leading to legal and political challenges.¹³⁸ This slow pace resulted in courts being overwhelmed with land claim matters and the dissipation of political aspirations aimed at redressing land dispossession.¹³⁹ Administering land reform through state agencies - such as the Land Bank and LCC - and mediation involving private banks made land reform expensive, bureaucratic, and prone to profiteering.¹⁴⁰

Some argue that the mere fact that property tends to be expensive causes slow land reform¹⁴¹. Hence, the court in *Mwelse and Others v Director-General for the Department of Rural Development and Land Reform and Another*¹⁴² urged the LCC to expedite land reform through legislative and constitutional development.

Blame for the stunted pace of land reform cannot be placed squarely on the shoulders of the LCC, as the government has contributed to this issue.¹⁴³

It is important to distinguish land reform from expropriation. The rules of land reform pertain to land tenure and the lawful restoration of property to its previous owner, whereas expropriation focuses on the acquisition of land by the state.¹⁴⁴ Expropriation is not land reform. It is a way of acquiring land, not buying it.

The court in *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces* had to freeze new

137 L Cliffe 'Land Reform in South Africa' (2000) 27 *Review of African Political Economy* at 277-278.

138 As above.

139 As above.

140 As above.

141 A Gildenhuys 'The Debate about Full, Partial or Nil Compensation in Expropriations for Land Reform Purposes in South Africa' (2019) 8 *European Property Law Journal* 143; T Kotzé 'Developing Criteria for the Identification of Suitable Agricultural Land for Expropriation and Redistribution in South Africa: Lessons Learnt from Namibia' (2021) 32 *Stellenbosch Law Review* 200; S Viljoen 'Expropriation without compensation: principled decision-making instead of arbitrariness in the land reform context (part 1)' (2020) 1 *Journal of South African Law* at 37; W Du Plessis 'Valuation in the Constitutional Era' (2015) 18 *Potchefstroom Electronic Law Journal* at 1727.

142 [2019] ZACC 30 para 41.

143 'South Africa: Govt will turn to alternative legislation to redistribute land - Justice Minister says' 08 December 2021. <https://www.africanews.com/2021/12/08/south-africa-govt-to-turn-to-alternative-legislation-to-redistribute-land/> (accessed 09 June 2024)

144 T Head 'Land expropriation and land reform: What's the difference?' 14 March 2018 <https://www.thesouthafrican.com/news/what-is-land-expropriation-land-reform/> (accessed 18 June 2024).

land claims applications when it declared the Restitution of Land Rights Amendment Act invalid.¹⁴⁵

Some analysts have suggested that it might take two centuries and R600 billion to process South Africa's land claims, owing to uncertainties surrounding expropriation and disputes over how the state can expropriate property and then dispute the price afterwards.¹⁴⁶ To ameliorate such backlogs, a proposal to amend section 25 was made.¹⁴⁷ This amendment would explicitly clarify that, in some instances, it may be 'just and equitable' to pay nil compensation.¹⁴⁸

Land is largely protected from devaluation, even when it is unproductive.¹⁴⁹ The land in *Business Venture* was barren and not used for its land use zone designation, yet the property owner claimed that it was entitled to compensation.¹⁵⁰ Molahlehi J noted that the nil compensation *in casu* was influenced by three factors. Firstly, R3 358 101,71 was owed by the applicant to the municipality.¹⁵¹ Secondly, the applicant utilised the land, which was zoned for agriculture, as a mining dump.¹⁵² Finally, determining the toxicity of the chemicals present in the slime dams required financial outlays, which were disadvantageous to the municipality.¹⁵³

According to Fuo, the Spatial Planning and Land Use Management Act ('SPLUMA',¹⁵⁴) empowers municipalities to designate spatial and land use management. This allows citizens to gain just access to land and enables the realisation of the right to adequate food, housing and water.¹⁵⁵ Put differently, SPLUMA has empowered municipalities to decide matters related to rezoning and township development.¹⁵⁶

145 2016 (5) SA 636 (CC); M Florentinos 'New Land Claims put on ice after Constitutional Court ruling' 24 August 2016 <https://www.dmlaw.co.za/new-land-claims-put-ice-constitutional-court-ruling/> - :~:text=All%20new%20land%20claim%20applications%20have%20been%20frozen,of%20the%20National%20Council%20of%20Provinces%20and%20Others. (accessed 18 June 2024).

146 'It could take 200 years and R600 billion to process South Africa's current land claims' 5 October 2018 <https://businesstech.co.za/news/government/275211/it-could-take-200-years-and-r600-billion-to-process-south-africas-current-land-claims/> (accessed 18 June 2024). K Khumalo 'Thirty-year backlog of land claims will cost R170 bn' 29 May 2023 <https://www.businesslive.co.za/bd/national/2023-05-29-thirty-year-backlog-of-land-claims-will-cost-r170bn/> (accessed 18 June 2024).

147 E du Plessis 'South Africa has another go at an expropriation law. What it's all about' 1 November 2020 <https://theconversation.com/south-africa-has-another-go-at-an-expropriation-law-what-its-all-about-148379> (accessed 18 June 2024).

148 Du Plessis (n 131).

149 C Tilly 'Does modernization breed revolution?' (1973) *Comparative Politics* at 444; U Özsü 'Grabbing land legally: A Marxist analysis' (2019) 32(2) *Leiden Journal of International Law* at 232.

150 *Business Venture* (n 9) para 13.

151 *Business Venture* (n 9) para 20.

152 As above.

153 As above.

154 Act 16 of 2013 ('SPLUMA').

Nil compensation is 'just and equitable' when the private property owner failed to adhere to zoning regulations, protect environmental resources, or mitigate environmental risks¹⁵⁷ and/or incrementally development of land for its intended purpose¹⁵⁸s.

In *Business Venture*, the applicant used land that was designated as agricultural land as a mining dump, in contravention of municipal zoning provisions.¹⁵⁹ Penalties for violating SPLUMA include fines, imprisonment, demolition orders and legal actions.¹⁶⁰ The applicant should have paid the fine for the expenses that the municipality incurred instead of demanding compensation.

The 'Final Report of the Presidential Advisory Panel on Land Reform and Agriculture' ('Final Report') is particularly significant. Land can be subjected to 'just and equitable compensation' if it falls into one of the following categories:

- (a) abandoned land;
- (b) hopelessly indebted land;
- (c) land held purely for speculative purposes;
- (d) unutilised land held by state entities;
- (e) land obtained through criminal activity;
- (f) land already occupied and used by labour tenants and former labour tenants;
- (g) informal settlement areas;
- (h) inner city buildings with absentee landlords;
- (i) land donations (as a form of Expropriation Without Compensation); and
- (j) farm equity schemes.¹⁶¹

The Final Report remains important for purposes of expropriation without compensation. Since expropriation bills have been rejected continuously, the courts may award expropriation without compensation, where necessary and justifiable. However, because it is only a report, the Final Report only has persuasive value.

For Van der Walt and Viljoen, constitutionalism must acknowledge that the right to housing symbolises not just material prosperity but the right to shelter¹⁶². Marginalised persons tend to organise in order

155 ON Fuo 'A Critical Investigation of the Relevance and Potential of IDPS as a Local Governance Instrument for Pursuing Social Justice in South Africa' (2017) 16 *Potchefstroom Electronic Law Journal* at 245.

156 N Raboshakga & O Fuo 'Appropriate Internal Appeal Mechanisms for Approval of Building Plans: Exploring the Gaps Left by the Constitutional Court' (2020) 23 *Potchefstroom Electronic Law Journal* at 11.

157 J de Visser & XS Poswa 'Municipal Law Making under SPLUMA: A Survey of Fifteen "First Generation" Municipal Planning By-Laws' (2019) *Potchefstroom Electronic Law Journal* at 2.

158 J de Visser & XS Poswa (n 157) 18.

159 *Business Venture* (n 9) para 20.

160 SPLUMA (n 154) secs 32 & 58.

161 T Kotze 'Developing criteria for the identification of suitable agricultural land for expropriation and redistribution in South Africa: Lessons learnt from Namibia' (2021) 32(2) *Stellenbosch Law Review* at 206; Advisory Panel on Land Reform and Agriculture 'Final Report of the Presidential Advisory Panel on Land Reform and Agriculture' Government of South Africa at 80.

162 A Van der Walt & S Viljoen 'The Constitutional Mandate for Social Welfare - Systemic Differences and links between Property, Land Rights and Housing Rights' (2015) 18(4) *Potchefstroom Electronic Law Journal* at 1060-1073.

to compel the government to provide housing, and, if formal housing is not made available, they build informal houses on vacant land.¹⁶³ Thus, municipalities are responsible for allocating housing to indigenes.¹⁶⁴

Although land reform and urban housing are dealt with in different departments, according to the Final Report, these two departments should not be viewed in isolation as they both advance the right to housing in order to correct past injustices.¹⁶⁵

As such, the legitimacy of nil compensation is somewhat redefined for land reform and progressive realisation of section 26(1) of the Constitution.¹⁶⁶ Hence, in *Port Elizabeth Municipality v Various Occupiers*, Sachs J held that homeless and destitute people should not be seen as a burden, nor should those with resources institutionally isolate such persons.¹⁶⁷ This transformative care was also apparent in *Diepsloot Residents and Landowners Association v Administrator, Transvaal*, where the Court held that ‘expropriation, designation and settlement are part and parcel of the attempted resolution of the squatter problem brought about by the increased urbanisation’.¹⁶⁸

In *Msiza v Director-General, Department of Rural Development and Land Reform (Msiza)*, the LCC held that a purposive interpretation of section 25 requires monetary settlements for expropriation to be informed by rational public purpose and not the commercialisation of the property.¹⁶⁹ The LCC held that it is not necessary ‘to compensate every potential loss of commercial opportunity’.¹⁷⁰ Determination of land requires a two-step approach: one must find a determined market value and then equitably adjust the compensation.¹⁷¹

The LCC in *Msiza* determined that the market value did not achieve an equitable balance, so it reduced the market value. The

163 J Strydom & S Viljoen ‘Unlawful Occupation of Inner-City Buildings: A Constitutional Analysis of the Rights and Obligations involved’ (2017) 36 *Potchefstroom Electronic Law Journal* at 1211, 1217, 1246-1247.

164 O Fuo ‘Local government indigent policies in the pursuit of social justice in South Africa through the lenses of Fraser’ (2014) 25(1) *Stellenbosch Law Review* at 197.

165 B Meyersfeld ‘The South African Constitution and the human-rights obligations of juristic persons’ (2020) 137(3) *South African Law Journal* at 467; L Royston ‘Security of urban tenure in South Africa: Overview of policy and practice’ in A Durand-Lasserve & L Royston (eds) *Holding Their Ground Secure: Land Tenure for the Urban Poor in Developing Countries* (2002) at 165-170.

166 Viljoen (n 141) 39.

167 2005 (1) SA 217 (CC) para 37.

168 1994 (2) All SA 299 at 307.

169 2016 (5) SA 513 para 47. *Msiza* appeared to hold the view that expropriation should not be affirmed by an extreme capitalist system that prioritises profiteering in a manner that is not just and equitable. Expropriation must be rational, sound and should not embrace exorbitant demands for market value; RC Wesley ‘Expropriation challenge in Latin America: Prospects for accord on standards and procedures’ (1971-1972) 46 *Tulane Law Review* at 257 fn 128

170 *Msiza* (n 169) para 47.

171 *Msiza* (n 169).

Msiza case was important because it established that compensation may be 'just and equitable' even when it is reduced or non-existent, as was the case in *Business Venture*. Unfortunately, the Supreme Court of Appeal overturned *Msiza*,¹⁷² which, to a considerable extent, stunted the potential growth of nil compensation jurisprudence.¹⁷³

Business Venture affirms the importance of the right to housing in terms of section 26 of the Constitution. This section limits property owners' rights proportionally and fairly. For instance, the Judge *in casu* noted that because the applicant failed to pay outstanding municipal taxes and used the land incorrectly, public purpose had to reign supreme.¹⁷⁴

Some believe that because section 25 of the Constitution permits expropriation without compensation.¹⁷⁵ It need not be amended. This is so in terms of section 25(2)(a) of the Constitution, which declares that property may be expropriated only in terms of a law of general application for public purposes.¹⁷⁶

Because of this legal uncertainty, the legislature has failed to outline the foundation of section 25's amendment and diffuse confusion, 'to make explicit what is implicit in the Constitution to allow expropriation without compensation'.¹⁷⁷ To amend this section and create legal certainty, the legislature may follow *Agri South Africa v Minister for Minerals and Energy*,¹⁷⁸ where it was held that the Constitution must ensure that land reform accomplishes 'equitable distribution of land and wealth to all'.

In the NP and ANC's discussions before the formal end of apartheid, the NP wanted to safeguard private property from arbitrary state interference, while the ANC negotiated for expropriation against 'just and equitable' compensation¹⁷⁹. The ANC believed that 'just and equitable' compensation should not be

172 *Uys & Another v Msiza & Others* 2018 (3) SA 440 (SCA).

173 Expropriation Bill (B23-2020. See also, for example, ANC Parliamentary Caucus 'ANC Study Group Welcomes the passing of the Expropriation Bill [B23 2020] in the National Assembly' 29 March 2024, <https://www.ancparliament.org.za/anc-study-group-welcomes-the-passing-of-the-expropriation-bill-b23-2020-in-the-national-assembly/> accessed 12 October 2024; M Merton 'Contested Expropriation Bill closer to becoming law, but don't hold your breath' 19 March 2024, <https://www.dailymaverick.co.za/article/2024-03-19-contested-expropriation-bill-closer-to-becoming-law-after-ncop-approval-but-dont-hold-your-breath/> (accessed 12 October 2024).

174 *Business Venture* (n 9) para 20.

175 S Mpofu-Walsh *The New Apartheid* (2021) at 136.

176 Parliament of the Republic of South Africa 'Ad Hoc Committee on amending section 25 of the Constitution' <https://www.parliament.gov.za/project-event-details/285> (accessed 11 June 2024).

177 J Gerber 'Expropriation without compensation: This is how the Constitution could be amended' 07 November 2024 <https://www.news24.com/News24/expropriation-without-compensation-this-is-how-the-constitution-could-be-amended-20191107> (accessed 11 June 2024).

178 2013 4 SA 1 (CC) at para 60.

construed solely through market value, but on the basis of public interest and land reform¹⁸⁰m.

Business Venture challenges the status quo by amplifying the need for housing as a source for utilitarianism and justification for public purpose in the expropriation of the property.¹⁸¹ During the 'deconstructionist logic' phase, according to Critical Legal Studies, a judge must employ 'scientific thinking' to utilise realism to overcome mechanisms designed to preserve the status quo at the risk of utilitarianism.¹⁸²

The law may be a social contract for the citizens of a country, but it can also be oppressive when it does not serve people equally.¹⁸³ *Business Venture* criticises the government's inability to expedite land reform when people need land for public purposes and shows a willingness to support redistribution and restitution initiatives.¹⁸⁴

The significance of calculating the market value of property slated for expropriation¹⁸⁵n was found in *Khumalo and Others v Potgieter and Others* ('*Khumalo*'¹⁸⁶), where a two-stage approach was utilised. To comply with section 25(3) of the Constitution, the court must first determine the market value of the property to be expropriated by adjusting compensation on four criteria.¹⁸⁷ia.

An alternative approach is found in *Du Toit*¹⁸⁸t wherein it was decided that market value could not be given priority in shaping what is 'just and equitable' in terms of section 25(3) of the Constitution¹⁸⁹n. Market value cannot take preponderance over expropriation because these factors were heavily influenced by socio-economic factors listed in section 25(¹⁹⁰3).

Greater emphasis must be placed on justice and equity, which is emphasised through the calculation of the market value in the current Constitution.¹⁹¹ Although there are contrasting views in the *Du Toit*

179 E du Plessis 'Land expropriation: Where law and politics collide' 20 July 2018 <https://www.news24.com/News24/land-expropriation-where-law-and-politics-collide-20180720> (accessed 25 January 2024).

180 Du Plessis (n 179).

181 *Business Venture* (n 9) para 20.

182 GE White 'From realism to critical legal studies: A truncated intellectual history' (1986) *South Western Law Journal* at 825.

183 O Lobel 'The paradox of extralegal activism: Critical legal consciousness and transformative politics' (2006) 120(4) *Harvard Law Review* at 957-958.

184 JL Gibson 'Land redistribution/restitution in South Africa: A model of multiple values, as the past meets the present' (2010) 40(1) *British Journal of Political Science* at 161.

185 BM Gibson 'Expropriation of land without compensation: an analysis of the history of the acquisition of property as a factor in determining just and equitable compensation' LLM thesis, University of Johannesburg (2022) at 2.

186 2000 2 All SA 456 (LCC).

187 *Khumalo* (n 186) paras 29-31.

188 *Du Toit* (n 127).

189 *Du Toit* (n 127) para 36.

190 As above.

two-stage approach, it is essential to question the market value calculated through section 12 of the Expropriation Act.¹⁹² When calculating market value in terms of section 12 of the Expropriation Act, credence must be given to section 25(3) of the Constitution's determination of what is 'just and equitable'.¹⁹³

Section 25 of the Constitution is filled with contradictions. On the one hand, it aims to address land dispossession by affirming the government's commitment to redistributing land equally.¹⁹⁴ On the other hand, it seeks to protect existing property owners.¹⁹⁵ To remedy this contradiction, courts can play a constructive role during the judicial review process.

The applicant in *Business Venture* may have argued that the state must consider market value, since it is a listed factor in the Constitution. However, market value should not be considered in isolation¹⁹⁶ as it must be considered along with other public purposes and interests.¹⁹⁷

Du Plessis's interpretation of *Business Venture* affirms that market value is not an obligatory consideration. The court stated that it was not a compulsory factor, but the municipality had the discretion to determine the range of 'five open-ended' factors that may be considered when interpreting section 25(3) of the Constitution.¹⁹⁸ For example, Strydom and Viljoen submit that the property's market value should be determined by its present use, irrespective of how small or large it is.¹⁹⁹

Viljoen submits that expropriation should not be viewed as arbitrary but as principled decision-making that reflects a redistributive approach.²⁰⁰ This redistributive approach through nil compensation is echoed by the recent 'failed' Bill as follows:

It may be just and equitable for nil compensation to be paid where land is expropriated in the public interest, having regard to all relevant circumstances, including but not limited to:

Where the land is not being used and the owner's main purpose is not to develop the land or use it to generate income, but to benefit from the appreciation of its

191 As above.

192 Gibson (n 185) 2.

193 As above.

194 A Rudman 'Re-defining national sovereignty: The key to avoid constitutional reform? Reflections on the 2011 Green Paper on Land Reform' (2012) 23(3) *Stellenbosch Law Review* at 419.

195 As above.

196 WJ du Plessis 'The (shelved) Expropriation Bill B16-2008: An unconstitutional souvenir or an alarmist memento?' (2011) 22(2) *Stellenbosch Law Review* at 370.

197 As above.

198 J Dugard & N Seme 'Property rights in court: An examination of judicial attempts to settle section 25's balancing act re restitution and expropriation' (2018) *South African Journal on Human Rights* at 41-42.

199 Strydom & Viljoen (n 163) 1327-1328.

200 Viljoen (n 141) 259.

market value;

Where an organ of state holds land that is not using it for its core functions and is not reasonably likely to require the land for its future activities and is not likely to require the land for its future activities in that regard, and the organ of state acquired the land for no consideration;

Notwithstanding registration of ownership in terms of the Deeds Registries Act, 1937 (Act No. 47 of 1937), where an owner has abandoned the land by failing to exercise control over it;

Where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land; and

When the nature or condition of the property poses a health, safety or physical risk to persons or other property.²⁰¹

Colonial land dispossession, submits Mawere, was facilitated by European settlers.²⁰² In that process, they did not pay compensation.²⁰³ For Mawere, it is unnecessary to espouse a market value-based approach since it limits the extent to which the state can correct the historical injustices of land dispossession.²⁰⁴ Over the years, there has been mounting dissatisfaction about the extent to which land reform and expropriation are hampered by precepts - particularly in common law - that give property owners enormous power to do as they wish with their land.²⁰⁵ For example, in *Gien v Gien*,²⁰⁶ the Court held that property owners have unrestricted freedom to use the surface of their immovable property without unjust interference by any authority.

However, in *Port Elizabeth Municipality v Various Occupiers*, the Constitutional Court held that courts should view issues related to housing and land reform not as 'against competing values, but with deep historical roots'.²⁰⁷ The *Business Venture* case is important as it shows the courts' unwillingness to compensate a property owner who was not using the property for its intended purpose. The property owner's desire to behave as it wished was proportionally limited, to the extent that landlessness and the housing provision corrected the historical roots of land acquisition through dispossession.

For Modiri, race informs systematic wealth deprivation and marginalisation, and, as such, Eurocentric legal systems are hurdles for decolonised and just outcomes.²⁰⁸ Hence, it is important for every judgment to compromise between protecting the colonial status quo and transformation brought about by the new status quo.²⁰⁹

201 Expropriation Bill [B 23-2020] clause 12.

202 J Mawere 'The legality of land expropriation without compensation in South Africa: A comparative in international legal approach' LLM thesis, University of Venda (2020) at 162.

203 As above.

204 As above.

205 G Pienaar 'The Effect of the Original Acquisition of Ownership of Immovable Property on Existing Limited Real Rights' (2015) 18(5) *Potchefstroom Electronic Law Journal* at 1485; FI Michelman 'Expropriation, eviction, and the gravity of the common law' (2013) 24(2) *Stellenbosch Law Review* at 252.

206 1979 (2) SA 1113 (T) at 1120C-D.

207 2004 (12) BCLR 1268 (CC) para 38 fn 37.

208 Modiri (n 83) 607.

Therefore, every verdict meant to shield the law upholding the status quo acts contrary to the ideals of constitutional reform, even when it is frank or spot-on.²¹⁰ This constitutional reform was seen in *Pillay N.O. v The Government of the Republic of South Africa and Others*, where the LCC held that since the property was left to deteriorate until it became a slum, the market value of the property should be reduced.²¹¹ This decision is unconventional, contrary to the frequent demonisation of nil compensation, and details how Critical Legal Theory should reflect constitutional reform without any form of compromise.

6 Conclusion

Many poor South Africans and radical political theorists who challenge the Constitution are becoming less tolerant of expropriation subject to compensation. This is because many impoverished people lack access to housing, and when they voice their displeasure are viewed as nuisances.

Niklas Luhmann's 'systems theory' has been used as an independent, self-referential regulatory system that stands apart from other normative systems. It divorces itself from religion, morality and social norms, and autonomously defines its own bounds in the course of autopoietic activities.

The first part of this contribution aimed to highlight *Business Venture's* attempt to synchronise concerns surrounding how colonialism and apartheid underwrote landlessness and the thriving capitalist system in South Africa. The justification for nil compensation is underscored by how positive law has been used to further advance colonial conquest, as section 25 of the Constitution promotes the status quo.

A decolonised perspective was inferred in the case of *Business Venture*, especially its justification of 'just and equitable' nil compensation. This article aligned itself with the judgement by analysing the Judge's construction of the Critical Legal Theory, which was infused with positive law without diluting radical political theorisation of the law.

209 As above.

210 As above.

211 (LCC 2019/42) [2022] ZALCC 21(08 August 2022) para 17.